Rent Me Trailer Leasing, Inc. ***and*** **Dennis Black.** Case 14–CA–21348

January 9, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On August 2, 1991, Administrative Law Judge Robert A. Giannasi issued the attached decision. The Charging Party filed exceptions and the Respondent filed an answering brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The Respondent contends in its answering brief that the Charging Party's exceptions are deficient in form and that all exceptions should be deemed waived. Although the Charging Party's exceptions do not strictly comply with Sec. 102.46(b)(1) of the Board's Rules and Regulations, we accept them because they are not so deficient as to warrant striking.

[2] The Charging Pary has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resloutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We agree with the judge, for the reasons stated in his opinion, that the General Counsel failed to establish a prima facie case that the Charging Party's asserted union activities were motivating factors in the Respondent's termination of his employment. We also agree that, even if such a case was established, the Respondent has shown that it would have terminated the Charging Party for lawful reasons. In these circumstances, dismissal of the complaint is warranted under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

William P. Barrett, Esq. and *Dorothy D. Wilson, Esq.*, for the General Counsel.

James N. Foster, Jr., Esq. and *Steven Griswold, Esq.*, of St. Louis, Missouri, for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. This case was tried on June 10, 1991, in St. Louis, Missouri. The General Counsel's complaint alleges that Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Dennis Black because of his union activities and Section 8(a)(1) of the Act by making three unlawfully coercive statements. Respondent filed an answer denying the essential allegations in the complaint. The parties filed briefs which I have read and considered.[1]

Based on the testimony of the witnesses, and my observation of their demeanor while testifying, as well as the documentary evidence and the entire record herein, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation with an office and place of business in Vandalia, Illinois, is engaged in the interstate and intrastate transportation of freight. During a representative 1-year period, Respondent derived gross revenues in excess of $50,000 from the transportation of freight from the State of Illinois directly to points outside the State. Accordingly, I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Leather Goods, Plastics and Novelty Workers' Union, AFL–CIO, Local No. 160 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

Dennis Black was originally employed with Respondent from August 13, 1988, through April 27, 1989. He delivered freight for Witte Hardware Company, Respondent's primary customer, indeed, its only customer in the Vandalia area. His supervisor was Mack Coker, the Respondent's general manager at the Vandalia terminal. Black was laid off in April 1989 because Respondent's new insurance carrier required drivers to have 2 recent years of over-the-road driving experience. Because Black did not meet this requirement he was laid off. There is no evidence that Black's work was found to be deficient in any way during this initial period of employment.

Black was rehired by Respondent in August 1990 after having met the 2-year driving requirement. Black heard that Respondent was in need of a driver and he called Coker about a job. Coker hired Black specifically to replace drivers who were on vacation or otherwise off work because of illness or injury. Black was hired as a temporary employee. He was told at the end of each week he worked whether he should come back the following week.

At the beginning of Black's second period of employment, in August 1990, Coker specifically told and explained to Black that he was being hired as a temporary employee. Coker also told Black that he did not want to take Black away from his then-existing regular job. Black responded that he would take his chances with Respondent because he

[1] The General Counsel filed a motion to strike portions of the Respondent's brief on the ground that it contained erroneous statements of the record. Although there may have been some overstatements in Respondent's brief, the motion is essentially an attempt to file a reply brief which is not permitted under Board Rules. I will neither strike the Respondent's brief nor reject the General Counsel's reply brief. Frankly, the posttrial papers filed by counsel were not particularly helpful. I cannot fully accept the view of the evidence expressed in the briefs of either counsel.

could always return to his existing employer. At least two such conversations took place between Coker and Black. One was at a restaurant the day before Black started work and the other was in the Respondent's office the next day. The latter conversation took place in the presence of and was overheard by office employee Lynette White who testified credibly about the conversation. She essentially corroborated Coker on this point. White, who prepared the paperwork on Black's employment, made a notation that Black was hired as a temporary employee. Because he was considered a temporary employee, Black was not issued a uniform like regular permanent employees, given material to join the incumbent Union which represented the Respondent's drivers, or placed in the Respondent's insurance plan. Documentary evidence, explained in meaningful detail by White, confirms that, although Black worked fairly regularly in August, September, and October 1990, he did so as a replacement for drivers who were off work for vacation or illness or injury. He drove different runs which were normally driven by other employees. The evidence is overwhelming that Black was hired and actually functioned as a temporary employee.[2]

In the fall of 1990, according to Black, he made inquiries of his fellow drivers about union representation and the name of the steward, if any. In fact, Respondent's 17 or so drivers were represented by the Union and covered under a collective-bargaining agreement. It does not appear, however, that the Union appointed a steward at Respondent's Vandalia terminal, or, indeed, that any written grievances were actually filed on behalf of employees. There is no evidence that Black's inquiries about union representation, if, indeed they were made to employees, came to the attention of any of Respondent's supervisors.

On Tuesday, November 6, 1990, Black went on a run to Chicago, Illinois. On his return on November 9, Black was notified that he would not be needed the following week. The notification came from Doug Meske who was in charge of the Vandalia terminal because Coker was away. Meske mentioned something about a letter complaining that Black had run someone off the road.

During Black's period of temporary employment Coker considered converting Black to a permanent driver. However, in October 1990, Coker received several customer complaints about Black. The complaints came from Witte Hardware, Respondent's primary customer. Coker discussed some of these complaints with Black.[3]

In early November, Witte Hardware forwarded another complaint to Coker, this in the form of an October 31, 1990 letter from a woman stating that she and her husband were nearly killed by one of Respondent's Witte Hardware trucks in Sweet Springs, Missouri. Coker investigated dispatch records and determined that the incident must have occurred on a run which Black was operating, on a substitute basis, at a time when Black would have been the driver involved. Coker made a decision at this point to terminate Black and he did so without showing Black the complaint letter or asking him for an explanation. Coker did write Witte Hardware on November 8, 1990, apologizing for the incident and notifying Witte that the driver had been terminated.

In addition to Black's poor driving and the complaints about him, Coker was faced with two other circumstances in early November which contributed to his decision to terminate Black at this time. First, Witte Hardware had forwarded to him the name of an applicant for permanent employment. That applicant, John Thompson, was hired by Respondent in November 1990; his first day of work was November 13. Secondly, the reason for Black's temporary employment had evaporated. By early November employees who were unavailable because of vacations, illness, or injury had returned to work. For these reasons, as well as Coker's loss of confidence in Black's driving and work abilities Coker decided to end Black's temporary employment. Coker's testimony about his reasons for terminating Black was candid and truthful.

On November 19, 1990, Black and his wife drove to Respondent's terminal to talk to Coker about his termination. According to Black, Coker came outside and told him, ''I don't like you nosing around about a union. I'm your union president, your union steward, and now your ex-boss.'' Black then brought up the letter that Meske had mentioned. Coker replied that ''we do have a letter in there where you run somebody off the road, too.'' Black said that this did not happen, but Coker said, ''I have no choice.'' According to Black, his wife was present during this conversation. However, when she testified in this proceeding, she did not mention any such conversation, even though she did testify—on cross-examination—that she saw Coker on November 19. She did not corroborate her husband's testimony concerning Coker's alleged remarks. Coker denied that he made the statements attributed to him by Black.

I do not credit Black's testimony about the November 19 conversation. This is based not only on Black's unreliable testimony on another issue, that is, whether he was hired as a temporary employee, but also because he was not corroborated by his wife who was also present during this alleged conversation. Furthermore, Black's testimony does not ring true. There is no context for Coker to have made statements about union activity; there is no evidence that he even knew that Black was ''nosing around'' about unions. In any event, Coker was much the more reliable witness and I credit his

[2] Black testified that during his second period of employment he ''settled in with two northeastern Missouri runs'' and that Coker said ''nothing'' about whether Black's status was temporary or permanent. To the extent that his testimony conflicts with that of White and Coker and the documentary evidence, I discredit Black. On cross-examination, Black conceded that he operated numerous different runs which were normally driven by others, a fact clearly established by the documentary evidence. He also admitted that when he went to work for Respondent he advised Coker that he could return to work for his then-employer. Although he did not testify in detail about any pre-employment conversations with Coker in his direct testimony, he was called as a rebuttal witness after Coker and White testified in detail about the conversations which led to his rehire as a temporary employee. He did not then testify about those conversations or refute their testimony. In all the circumstances, I find that Coker and White testified truthfully about these matters. Black was not a reliable witness on either the conversations, as to which he testified only generally at best, or the status of his employment, as to which I am convinced he testified untruthfully.

[3] Black denied that Coker ever mentioned such complaints to him. I reject Black's testimony on this point because of his unreliability on other aspects of his testimony. Coker was clearly a more credible witness than Black.

denial that he made the statements attributed to him by Black.

On January 17, 1991, Mrs. Black stopped by the Vandalia terminal to speak with Coker about the complaint letter. She asked Coker for a copy of the letter. Coker said he could not provide her with a copy. According to Mrs. Black, Coker said that the letter was not the reason for the termination of her husband. Coker said, ''Have you ever heard of politics,'' and Mrs. Black responded, ''I'm afraid I have.'' Coker candidly admitted that he mentioned ''politics'' in his conversation with Mrs. Black in January 1991.

Black himself testified that later that day he called Coker and asked him to explain what he meant by ''politics'' and that Coker refused to elaborate. Because of Black's unreliability as a witness, I cannot accept this version of events. However, even if something like this happened, I do not believe anything can be read into what allegedly was said other than the words which were allegedly spoken.

B. *Discussion and Analysis*

Based on my credibility determinations, I shall dismiss the allegation that Respondent violated Section 8(a)(1) when Coker told Black in November 1990 that he was fired for ''nosing around'' about a union. Not only was that statement never uttered, but there is no evidence that Coker knew that Black was ''nosing around'' about a union or cared if he did.

The second 8(a)(1) allegation is based on Coker's statement to Mrs. Black in January 1991 which assertedly implied that her husband had been fired because of his interest in the Union. The reference to ''politics'' in that conversation is much too ambiguous for me to base a finding that this meant that Coker was admitting that the discharge was due to union considerations. It could well have been a reference to a belief that Coker was forced to hire someone referred to him by his major customer or that he had to fire Black because his major customer complained about Black's driving. Pleasing the customer can be viewed as ''politics.'' In any event, it is the General Counsel's burden to demonstrate that the reference was to union activities. And there is no evidence or context from which I could infer that Coker meant his reference to relate to union activities of which there is no evidence that he had knowledge.

Finally, even assuming, contrary to my credibility determination, that Coker refused to further define ''politics'' in a subsequent telephone conversation with Black, there is no reason to infer that this implied that Black's discharge was based on union considerations. Here again there is no context within which to make the inference urged by the General Counsel.

In sum, I shall dismiss all of the 8(a)(1) allegations in the complaint because the General Counsel has not proved violations by a preponderance of the evidence.

In view of my findings set forth above, and my credibility determinations, there is no basis for even a prima facie case of a violation of Section 8(a)(3) and (1) in the discharge of Black. There is no evidence that his rather innocuous union activity—even if his testimony is believed—was known by Respondent. Nor is there any evidence that Respondent cared that he was talking to other employees about union representation. There was after all a bargaining relationship between Respondent and the Union. The General Counsel's unsupported allegation of a ''cozy'' relationship between the Respondent and the Union is in any event irrelevant in the absence of an allegation of Section 8(a)(2) assistance or evidence that Respondent knew or cared about whatever Black was trying to do to disturb such an alleged ''cozy'' relationship. The General Counsel's contention in this respect is pure speculation. In short this case lacks both knowledge and animus; indeed it is woefully short of union activity.[4]

Moreover, Respondent's reasons for dismissing Black were not, contrary to the General Counsel's contention, shifting and inconsistent; they were plausible, consistent and convincing. They came from a credible witness whose story hung together with the rest of the evidence in this case. Black was hired as a temporary employee. The temporary work had run out. Black had spawned customer complaints. The last such complaint was serious and it was timed in such a way as to coincide with the return of drivers for whom Black was substituting and the hire of a new driver who had been referred by Respondent's primary customer. There is thus no basis for a finding that a reason for Black's discharge was his alleged union activity. Even if there was, Respondent has shown conclusively that it would have terminated him in any event for lawful reasons. The only arguably suspicious aspect of Respondent's handling of the termination was its failure to show Black the complaint letter or to give him a chance to answer it. However, the General Counsel does not dispute that Coker's investigation correctly pointed to Black as the offending driver. In view of this complaint forwarded to Coker from his major customer, and the other circumstances which show overwhelmingly that the termination was not based on union considerations, but on other legitimate considerations, I cannot make any adverse inferences based on this failure. Accordingly, I find that, here again, the General Counsel has failed to prove a violation—this time discrimination—by a preponderance of the credible evidence.

CONCLUSION OF LAW

The Respondent has not violated the Act in any way.

On these findings of fact and conclusion of law and on the entire record, I issue the following recommended[5]

ORDER

The complaint in this case is dismissed in its entirety.

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[4] The General Counsel's attempt to make something of the fact that Black was once a union president when he worked for a previous employer falls far short of any relevancy. This work and union experience ended in November 1985 well before even Black's initial employment with Respondent. There is no evidence that Respondent held this against Black. Indeed, it hired him twice and there is no evidence that, assuming knowledge and concern about this fact, something happened during the second period of his employment that would have made this an operative consideration in Black's termination.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.